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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 763

DIXIE ROSE NURSERY, *Petitioner,*

v.

CONWAY P. COE, Commissioner of Patents, *Respondent.*

REPLY BRIEF FOR PETITIONER.

In the brief for respondent, counsel have appropriately and succinctly stated, at pages 5 and 6, the basic principle of the common law of trade-marks, which was that the function of a trade-mark is to indicate the *source* of the particular product to which the mark is applied.

The basis of this principle is exceedingly well stated by Mr. Justice Frankfurter in *Mishawaka Rubber and Woolen Manufacturing Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, at page 205, as follows:

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select

> what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain redress."

It is admitted by petitioner that such was the basic principle which was carried forward into the Trade-Mark Act of 1905 which expressly prohibits the registration of marks that are *merely* descriptive of the goods with which they are used, or are *merely* geographical.

The difficulty here arises from the failure of the Courts below to correctly apply this principle to the facts presented in this case, and the misapplication of the construing authorities both by the Court below and by counsel for respondent. In other words, the Court of Appeals below has announced a totally new principle or theory which ignores or at least emasculates the basic principle above referred to. This is fully evident from the language of the Court in its decision at pages 105 and 106 of the transcript of the record, reading as follows:

> "If a man should invent a combination automobile and airplane, and call it an ambi, the name would at first be arbitrary and not descriptive. But if the name were applied, for a considerable period, to all such combinations and to nothing else, the name would come to identify or describe the thing, as the word 'cellophane' has come to describe a thing. * * * The Patent Office and the District Court might properly conclude that the words 'Texas Centennial', though originally arbitrary, have come to describe to the public a rose of a particular sort, not a rose from a particular nursery."

This theory of the Court below has no foundation in fact or in the language of the Trade-Mark Act of 1905 which defines the right of and inhibitions against *registration* of trade-marks. Moreover, as applied to the facts in this case, the theory of the Court below has the effect of prohibiting registration of petitioner's trade-mark substantially *immediately* after adoption of the mark (having in view that petitioner's application for registration was filed less than six months after adoption of the mark), and notwithstanding the admission by the Court that the Patent Office and the District Court might properly have held that petitioner's mark was *originally arbitrary;* also, notwithstanding the absence of any 'considerable period' of use at the time of filing application for registration, upon which the Court premised its theory of acquisition of descriptive significance of marks used upon nothing else than the newly invented thing for a considerable period. Even adding to this the few years occupied by the proceedings in the Patent Office and in the Courts below, up to the date of the decision of the Court of Appeals, is not a *considerable period* such as to imply the acquisition of descriptive significance of petitioner's trade-mark as in the Cellophane case. Mere lapse of time was not the controlling factor in the Cellophane case where the issue was trade-mark infringement *after* expiration of the patent on the goods. Petitioner's patent here has not yet expired.

Counsel for respondent totally ignore the principles announced by the Court below in reaching its decision, which principles are *new* and which must necessarily constitute the issues before this Court. While it may be true that the primary issue is whether the Commissioner of Patents improperly refused to issue a certificate of registration for petitioner's mark, there are other issues involved necessarily by virtue of the new reasons and theories, and misapplication of authorities, relied on by the Court below in reaching its conclusion on the primary issue, all of which counsel for respondent pass over in their brief, which purports to

justify by another line of argument and further misapplication of authorities and principles of law, independently of the opinion below, the erroneous conclusion on the main issue.

The authorities relied upon by respondent are easily distinguished from the present case and do not support respondent's contention that registration of petitioner's trade-mark was properly refused. Rather, many of these same authorities announce principles which support petitioner's right to registration of its mark.

No parallel case has been cited in respondent's brief, and as indicated in the main brief of petitioner, counsel for petitioner have likewise found none, thereby pointing to the novelty of the issue in this case so far as it relates to the general right of registration under the Act of 1905, in a proceeding before the Patent Office. Most of the authorities relied on by respondent, and particularly the Singer and Cellophane cases relied on by the Court of Appeals below, spring from a construction of the Act in suits for infringement *after* registration of the trade-mark, and deal with the general proposition of loss of exclusive right to the registered trade-mark either as a result of expiration of the patent on the goods to which the trade-mark was applied, or where the registration of the mark was improperly granted by reason of the lack of the registrant's exclusive right to or ownership of the mark at the time the registration was applied for. These are totally different circumstances from those involved in this case. *Even in the case of marks which are purely and inherently descriptive in their ordinary and fundamental sense, and are used on patented goods, the Courts have not held that the registered marks were invalid during the life of the patents on the goods,* but rather it is the exclusive right to the registered mark which the Courts have held was lost on expiration of the patents because of the loss of the monopoly on the goods. Even then, competitors of the original proprietor are required to clearly distinguish between their goods and those of the original pro-

prietor so as to prevent the palming off of the competitors' goods for those of the original proprietor.

Accordingly, the Courts still give full recognition to the right of protection of the proprietor's original good-will against unfair competition notwithstanding a declaration of loss of the trade-mark rights upon expiration of the patent monopoly on the goods. This is the doctrine of the Singer and Cellophane cases which petitioner distinguishes from this case in its main brief, and which respondent does not dispute in his brief.

In spite of the fact that the Court of Appeals below relied heavily and primarily on the Singer and Cellophane cases, both of which involve as the basic issue the loss of trade-mark monopoly on patented goods *after* expiration of the patent, counsel for respondent state at page 9 of respondent's brief, paragraph numbered "2":

> "No importance attaches to the fact that the product for which the trade-mark was rejected was patented."

How could this statement be true in the face of the language quoted at page 2 herein from the decision below, and which is further expressly predicated upon the very existence of petitioner's patent as evidenced by the following words found near the end of the decision:

> "To allow registration of the name 'Texas Centennial' would give appellant an unfair advantage, despite the fact that only appellant and its licensees now produce Texas Centennials. *It would tend to prolong appellant's monopoly, beyond the life of appellant's patent, by making it difficult for a newcomer to break into the field.* We cannot read such an intent into the Trade-Mark Act." (Italics ours.)

The Trade-Mark Examiner's original ruling in the Patent Office, that petitioner's trade-mark was not registrable because the plants put out under the said trade-mark were patented, was expressly *over-ruled* by the Commissioner below (Pl. Ex. #1, p. 63). This ruling was at least affirmed

by the judgment of the District Court, and then the refusal on the above ground was restored or re-established by the Court of Appeals below, the decision of which Court is sought to be reviewed on this point, among others, by the present petition because improperly grounded in law. It may be appropriate to remark, in connection with the above matter, that respondent apparently recognizes by its concession in the first paragraph at page 9 of its brief that the decision of the Court of Appeals below went too far in the above pronouncement *affecting trade-marks for patented products*, and is now seeking to eliminate from discussion the issue raised on this point by petitioner herein, as well as seeking to set aside the effect of the last decision below. The respondent recognized the invalidity of the reasoning of the court below and its fatal effect, if sound, upon thousands of registrations of trade-marks now in existence. The Commissioner of Patents well knows that he and his predecessors have registered such thousands of trade-marks for patented products since the passage of the 1905 Act, and the decision of the court below so clearly disturbs the valid status of such registrations as to create great confusion and a status of questionable validity of such registrations in respect to the owners thereof.

Moreover, this Court has appropriately recognized by the language found in the dissenting opinion of Mr. Justice Black, in *General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U. S. 175, at page 186:

> "At this time a great portion of the common articles of commerce and trade is patented. * * * Patented articles are everywhere."

Petitioner asserts that it was not the intent of the Act to inhibit registration of marks of the character here involved when used upon patented goods, and this is amply borne out by the actual grant of thousands of registrations for marks of a similar character which are obviously used in commerce upon patented goods.

Yet the Courts below in the instant case have unquestionably applied a different rule to petitioner's patented articles (roses, scions and cuttings) in determining petitioner's right of registration of its trade-mark for such articles, than has been customarily applied to the determination of registrability of trade-marks for other commonly patented articles of commerce ever since the enactment of the Act of 1905, as evidenced by the thousands of registrations which have been granted under this Act, and illustrated by the selected registrations which are exhibits in this case.

Both the Patent Office, and now counsel for respondent here, have attempted to ignore or excuse these prior illustrative registrations as being irrelevant, or as being administrative errors, (page 8, of respondent's brief) but we respectfully submit that these prior registrations are not only perfectly relevant, but also conclusively show the correct meaning and interpretation of the statute in question as it has existed for nearly forty years. Thus, the grant of thousands of registrations for trade-marks which are fully comparable to the mark here in issue, and indeed, the registration of the very same mark for a variety of wine (Reg. #340,379, Pl. Ex. #12), is a far safer guide to the right of registration of petitioner's mark than the labored reasonings and theories relied on by respondent and the Courts below.

Petitioner never has, and does not now contend that the other marks that have been registered by the Patent Office are *more descriptive* than petitioner's mark, and therefore denies the statement found at page 8 of respondent's brief and purporting to be attributed to the Petition at pages 28-32. Petitioner certainly does not contend that the registered marks there referred to are descriptive, but logically and properly relies upon the grant of those registrations as illustrative of thousands from which the particular registrations were selected at random, to show that the practice of registering marks under circumstances similar to those involved here, has long been well settled and that even after the decision below, and up to the date of filing of the peti-

tion here, the Patent Office is not following the theory or principles of the decision below. *Where could there be a clearer case of discrimination against petitioner in respect to the right of registration here sought to be established by this Court!*

The cases construing Section 5 of the Act of 1905 as regards the unregistrability of merely descriptive names of products are legion. They hinge largely on the question of whether or not the names are generic and the only names by which the products are known, or are so aptly descriptive of a characteristic or quality of the product as to be inherently descriptive of the product. For example, in the "Shredded Wheat" case (*Kellogg Company* v. *National Biscuit Co.*, 305 U. S. 111, 116), referred to at page 6 of respondent's brief, this Court said:

> "The plaintiff has no exclusive right to the use of the term 'Shredded Wheat' as a trade-name. For that is the generic term of the article, which describes it with a fair degree of accuracy; and is the term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the original maker of the product acquired no exclusive right to use it."

Moreover, the Court further observed in that case the fact that the basic patent for the product and for the process of making it, and in many other patents for special machinery to be used in making the article, the patents repeatedly used the term "shredded" as descriptive of the product. In these respects, that case is parallel to the Cellophane case referred to at pages 5, 9, 10, 16, 20 and 32 of the petition and petitioner's supporting brief. Neither of these cases, therefore, constitutes a controlling authority as to the particular issues here, for the reasons given above and in petitioner's main brief.

The case of *Speaker* v. *Shaler Co.*, 87 F. (2d) 985, referred to at page 6 of respondent's brief, falls in the same category as the "Shredded Wheat" case. There, the words "Hot Patch" are aptly descriptive of the goods and could

not possibly have any other meaning to the public, and the goods could not be obtained by the public by any other name. This is quite different from the facts here.

The Lady Finger Grapes case (*A. B. Humphrey Co.* v. *Arkelian*, 34 F. (2d) 749), cited at page 6 of respondent's brief, is also distinguished from the instant case for the important reason that the registrant was not the originator of the mark "Lady Finger" and was not entitled to the exclusive use of the mark when the registration was applied for. On the contrary, the proofs showed that the name "Lady Finger" was adopted because of the resemblance of the shape of the grapes to the shape of ladies' fingers, and therefore aptly descriptive of a characteristic or attribute of the article on which the mark was used; and more importantly, the name was known as the name of the goods many years prior to adoption and use of the name by the registrant. Therefore, the mark "Lady Finger" was not even a good mark at common law. Moreover, the registrant was not the originator of the *product*, as in the case here, so there was no patent on the product to establish a control of the goods by a single source. Thus, the Lady Finger Grape case is similar to the case of *Hoyt* v. *J. T. Lovett Co.*, 71 Fed. 173, cited at page 10 of respondent's brief, and which involved the use of the obviously geographical name "Green Mountain" on grapes. Since Hoyt was not the first user of the name "Green Mountain" and the name was originated by another to designate the place of origin of the original vines which were discovered growing wild on the side of the Green Mountains in Vermont, Hoyt clearly had no exclusive right to such a geographical name. Incidentally, it may be pointed out here that the Lovett case was decided before the passage of the Act of 1905, and before the amendment to the patent statutes which provides for the patenting of plants.

As contrasted with the facts of both the Shredded Wheat case and the Lady Finger Grape case, petitioner's mark here is neither generic nor aptly descriptive of petitioner's

goods as will be clearly apparent from the application of the test of the mark as applied by this Court in *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, cited and discussed at length in petitioner's main brief at pages 22 and 23. Moreover, the evidence in this case conclusively establishes that the generic name of petitioner's goods is "Red Hoover" and was so known by the public and the trade both before and since the adoption of the "Texas Centennial" mark here in issue.

This factor is significant, as was observed by the Court in *Bayer Co.* v. *United Drug Co.*, 272 Fed. 505, 509, cited at page 6 of respondent's brief. Judge Learned Hand there said:

> "The validity of a trade-mark does not, indeed, rigidly depend upon its meaning only the differential between a genus, defined by the kind of goods, and a species, defined by that kind when emanating from the owner. Guastavino v. Comerma, (C. C.) 180 Fed. 920. When it means the owner as well as the kind, it will be entitled to a qualified protection; when, as here among the trade, there is another current word, it may be entitled to absolute protection, patent or not. For a patent gives the public no greater rights than it has without patent."

Since both the trade and the public, in the case of petitioner's mark here, definitely have another current name "Red Hoover", well known to them and extensively advertised by petitioner as the generic name of its goods, petitioner is entitled to absolute protection of its "Texas Centennial" mark, patent or no patent, and the mark clearly qualifies as a registrable mark under the Act.

With regard to respondent's views as to the evidence in this case, discussed under paragraph numbered "1" at pages 7 and 8 of respondent's brief, these views in large measure distort the testimony of petitioner's witnesses as to the facts, and consequently are the personal views of counsel for respondent as to the facts. It is well recognized that on cross-examination, a witness sometimes becomes

confused and may give answers which may be subject to a meaning different from that intended, but which answers are wholly satisfactory to the cross-examiner. Petitioner submits that the findings below are not supported by the evidence when considered in its entirety.

For example, counsel for respondent state at page 7 of respondent's brief, that "one of petitioner's own witnesses, a member of his firm, unequivocally testified that 'Texas Centennial' was the name of a particular variety of rose and had never been applied to any other (R. 41), and that the company's intention in adopting that name was to identify the plant therewith (R. 44)." However, it is clear from the testimony of the witness Watkins, as a whole, that what he meant was that the name "Texas Centennial" was a variety name in the same sense that every trade-mark name, like thousands that have been registered, becomes the variety name of the particular goods on which the mark is used, and that the company's intention in adopting the name was to identify the plants with the company, thereby denoting origin in the petitioner company like any other trade-mark (Tr. 43, 48, 49). Moreover, this is fully corroborated by the testimony of the witness Stark (Tr. 68).

The fact that petitioner and its licensees are not required to tell their customers that the plants originated with the Dixie Rose Nursery, as stressed by respondent at pages 7 and 8 of respondent's brief, is not controlling. As appropriately pointed out by Derenberg in "Trade-Mark Protection and Unfair Trading" (Ed. 1936, Chapter 2, Section 3, pp. 34-35):

> "It is only since the end of the last century, then, that with the gradual recognition of the word trade-mark, the edge of the traditional doctrine of indication of origin and ownership was blunted. From that time the concept of the trade-mark was no longer inextricably bound up with the name of the manufacturer and the place of manufacture. Now attention was focused upon the 'reputation of the goods.' The courts began to realize that it was the mark itself which caught the pub-

lic's eye rather than its manufacturer or place of manufacture.

> 'We may safely take it for granted that not one of a thousand knowing of or desiring to purchase "Baker's Cocoa" know of Walter Baker & Co., Ltd.'
>
> Examples are legion which prove that nine out of ten buyers did not know the producer of the article they usually bought."

This position is particularly applicable to the extensive licensing practice of the present day, employed by most patent owners, as well as by petitioner here, to extend their market by the grant of licenses to produce and sell the patented goods. The grant of such licenses does not affect the trade-mark of the licensor. This is fully borne out by the decision in *Keebler Weyl Baking Co.* v. *J. S. Ivins' Son, Inc.*, 7 F. Supp. 211, 214, in which the Court said:

> "The use of a trade-mark does not any longer necessarily import that the articles on which it is used are manufactured by the user but it may be enough that they are manufactured for him, that he controls their production or even that they pass through his hands in the course of trade and that he gives to them the benefit of his reputation and name or business style. * * * An article need not be actually manufactured by the owner of the trade-mark, it being enough that it is manufactured under his supervision and according to his directions thus securing both the right of the owner and the right of the public. * * *"

In this connection, petitioner asserts that its "Texas Centennial" trade-mark is equivalent to its signature, just as this Court held in *Menendez* v. *Holt*, 128 U. S. 514, that the mark "La Favorita" was equivalent to the signature of Holt & Co., even though their name did not appear upon the goods sold by their agents or licensees.

In addition, the evidence in this case amply proves that the roses sold to the trade by petitioner and its licensees bear the trade-mark tag of petitioner, and petitioner has

full control over its licensees in respect to the growing and marking of the plants by the latter (Tr. 50, 52, 53).

Counsel for respondent likewise distort the evidence as to the descriptive or non-descriptive significance of petitioner's mark. Respondent's only basis for the view that the mark is descriptive is the mere listing of the mark in petitioner's catalogues and in other publications. Such publications are not self-proving as regards evidence of descriptiveness and any descriptive significance attached to listings of this character is purely and simply the personal opinion of counsel for respondent. If such a test of descriptiveness as is here relied on by respondent, were applied to all trade-marks generally, every trade-mark would be descriptive and no marks would be registrable.

Respondent carefully evades the disclaimer issue raised under paragraph numbered "2" (page 13) in the petition, under The Questions Presented, and argued in petitioner's main brief under Point VI (pages 34, 35). The decisions cited in paragraph "3," at pages 9 and 10 of respondent's brief are not in point. Petitioner's composite trade-mark is not composed by merely combining two non-registrable descriptive features, or two non-registrable geographical features, or a non-registrable descriptive feature and a non-registrable geographical feature. In the case of *In re Meyer Bros. Coffee & Spice Co.*, 32 App. D. C. 277, 278, the mark "America's Strength" is composed of an obviously geographical word and an obviously descriptive word aptly describing a characteristic or quality of coffee, leaving nothing else on which to predicate an arbitrary, non-descriptive meaning of the mark as a whole. Likewise, the map of Canada *alone*, which was the mark involved in the case of *In re Canada Dry Ginger Ale*, 86 F. (2d) 830, could be nothing else than geographical, and therefore unregistrable. In the later decisions involving the *composite* mark "Canada Dry" and map of Canada (*In re Canada Dry Ginger Ale*, 87 F. (2d) 736 and 87 F. (2d) 737), the cases turned on a totally different ground, namely, that the words "Canada Dry" had already been registered under the 1920

Amendment to the Act of 1905 (providing for the registration of descriptive marks), and by reason of the thus admitted descriptive significance of the words "Canada Dry", there was an estoppel against registration of the composite mark, because both the words and design were clearly within the inhibitions of the statute.

In the case of *In re Midy Laboratories,* 104 F. (2d) 617, 618, the mark sought to be registered was "Piperazine-Midy", and the applicant admitted that the word "Piperazine" was descriptive of the goods, and since "Midy" was obviously a surname, the composite mark was clearly unregistrable.

For the above reasons, these cases are all easily distinguished from the present case and constitute no authority against the question presented here. In the proceedings below, it has never been held that the words "Texas Centennial" together are geographical, but only the word "Texas" alone and the map. This distinguishes the present case from the "Elgin" and "Lackawanna" cases cited at page 6 of respondent's brief. Moreover, there is no evidence having the character of the positive proof required by the Court in *President Suspender Co.* v. *MacWilliam,* 238 Fed. 159, cert. den. 243 U. S. 636, pointing to a descriptive significance of the words "Texas Centennial" as applied to roses, scions and cuttings, to justify the holding that petitioner's mark is descriptive. As measured by the test used by this Court in the Hamilton-Brown Shoe case, supra, the only proper conclusion is that these words as a whole are not descriptive of petitioner's goods, and the assertions to the contrary by respondent are purely that presumption which has been condemned by the Courts.

It is further significant that respondent totally ignores the issue, as did the Court of Appeals below, raised in paragraph "5" (page 14) of the petition, under The Questions Presented. The very failure of counsel for respondent and the Courts below to apply their conclusions to all the facts established by the evidence, accounts, in part at least,

for the misapplications of the principles of law and misconstructions of the Trade-Mark Act of 1905, which are presented in the brief of respondent and in the decision below. In other words, respondent's brief is based entirely upon the position taken by the Patent Office rather than either the evidence or the new and theoretical principles applied by the Court below.

CONCLUSION.

If the new principles and theories applied to this case by the Court of Appeals below, are to be taken as the true measure of the Trade-Mark Act of 1905, it is not seen how any trade-mark, used upon a single product emanating from a single source, in general, or upon plants in particular, may be registered under the Act, whether such goods are patented or not. Furthermore, in the case of patented goods, the trade-mark proprietor will be penalized for having obtained a patent, especially if he may not even register his trade-mark *during* the life of the patent, as has been held here by the Court below. Surely, this was not the legislative intent of the Act, as evidenced by the following words of this Court, found in the Singer Case relied on by the Court below:

> "To say that a person who has manufactured machines under a patented monopoly can acquire no good-will, by the excellence of his work, or the development of his business, *during the patent,* would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or good-will resulting from meritorious work would be subject to appropriation by every one. On the other hand, to compel the one who uses the name after the expiration of the patent, to indicate that the articles are made by himself, in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public." (Italics ours.)

The above principle pronounced by this Court has been completely ignored or misapplied by the decision of the Court of Appeals below, and is directly contrary to the statement by the Court in its decision that "It is conceived to be unfair to require buyers who are indifferent to source, and want merely goods of certain characteristics, to name a particular source in order to name the desired characteristics." This Court did not conceive it to be unfair in the Singer case even though it was dealing with the effect of the trade-mark *after* expiration of the patent, as distinguished from the right of registration *before or during* the life of the patent, which is the issue here.

For the foregoing reasons, it will be fully apparent that this case presents a question of substance and general importance, involving a construction of a Federal statute. Unless the decision below is corrected and reversed by this Court, a grave hardship and injustice will be imposed upon petitioner and upon the entire plant industry, as well as upon all trade-mark owners at large.

Accordingly, it is further prayed that the petition for certiorari be granted.

Respectfully submitted,

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